CONTRACTS EXEMPTING EMPLOYERS FROM LIABILITY FOR NEGLIGENCE.

The negligence, real and imaginary, of employers of labor, gives rise to a large proportion of the lawsuits of every industrial community. Such actions are among the contingencies which are expected and in recent years commonly insured against. To avoid the expense of casualty insurance and the risks of not insuring, the wit of the employer has devised various schemes which have from time to time come before the courts. They are intended to furnish a sort of cheap insurance. It is the object of this article to bring in review some of the principal authorities and seek what answer the courts are giving to the question whether the insurance is as effective as it is economical.

The simplest way to attain the result desired by the employer is to adopt the scheme of a contract between employer and employee, under which the latter for a consideration, substantial or nominal, expressly waives all right to recover for personal injury.

Such contracts have occasionally come before the courts and have met with varying fortunes. On the one hand it has been said that freedom of contract should be respected and that the workingman being under no disability and dealing as he does at arm's length with his employer, should be held to his bargain. On the other, it has been contended that the freedom which the employee is presumed to enjoy of choosing employers and refusing to contract with those who exact terms unfavorable to him is more theoretical than real, that the workingman as a matter of fact gets little or nothing for the risk which he assumes and that public policy demands the avoidance of such contracts not only for the good of the employee but for the safety of society at large. It may be assumed at the start that a contract should stand unless there are strong reasons why it should not and that the courts should yield not too readily to the flexible and uncertain demands of public policy.

There is no reason why a contract changing the degree of care, which in the absence of agreement the law imposes, should be invalid by virtue of that fact alone, or why under ordinary

circumstances it should be unlawful for parties to contract that no care at all need be used; or in other words, that there shall be no liability for negligence. There seems, therefore, to be no general rule that contracts under which the contractor is not liable for negligence are illegal.[1]

It is undoubtedly true that contracts of this nature react upon society at large and render the world a little less safe to live in, but the effect is too remote and the public considerations not pressing enough to alter the general policy of the law, to leave contractors alone.

But to this principle of freedom of contract there are well-recognized exceptions. Many of the courts say that if the contractor is performing services of a quasi-public character, which all may demand, and of which quite likely he has a monopoly, his power to contract away his liability for negligence is much restricted, and hence the long lines of decisions defining the powers of common carriers, telegraph companies and the like in this regard. Is there to be added to this exception to the rule, a second, that one may not by contract exempt another who owes him certain care in matters affecting personal security by virtue of their relation from the consequence of his negligence? It is obvious that the question as it arises between employer and employee is but a phase of a much broader question, and here it may be said that the fact that the employer is discharging a quasi-public duty, as that of a common carrier must be immaterial. Whatever his relation to his customer that to his servant is purely private and contractual.

To recur for a moment to the broader aspect of the question, there can be no consideration of public policy which prohibits a party who is allowing another to enter into a relation with him for the sole benefit of that other to make a contract under which the one who is granted the favor shall assume the risk. Under those circumstances the contract is rather technical than real. Hence one who is riding on a free pass may assume all risks.[2]

As to contracts exempting employers from liability, the English law as interpreted by the courts, pronounces them valid, the leading case being Griffiths *v.* Earl of Dudley, L. R.,

[1] As illustrating this, see Hartford Fire Ins. Co. *v.* C. M. and St. P. R. R. Co., 70 Fed. Rep. 201; 30 L. R. A. 193. Griswold *v.* Illinois Central Railroad Company, 90 Iowa 265; 24 L. R. A, 647. Stephens *v.* S. P. Ry. Co., 109 Cal. 86; 29 L. R. A. 751.

[2] Griswold *v.* R. R. Co., 53 Conn. 371: Quimby *v.* Boston and Maine R. R. Co., 150 Mass. 365; 5 L. R. A. 846.

9 Q. B. Div. 357. In this case an injury occurred through a defect in an apparatus existing through the negligence of the defendant's inspector, whose duty it was to see that the machinery and plant were in proper condition. There existed among the workmen a benefit association which paid an indemnity to persons injured, to which the employer contributed the same amount as the sum of the contributions of the workmen, the latter sums being deducted from their wages and paid into the fund.

While the plaintiff was in the defendant's employ the latter caused to be circulated through the collieries and posted in the houses of the employees, a printed document headed "Conditions of Employment," reciting that in consideration of the employer continuing to contribute to the benefit society, and of the continued employment of the several workmen and as a part of the terms of their employment, it was agreed that every employee undertook in behalf of himself and his representatives to look to the benefit fund alone in case of injury, and that the master should not be liable even in case of negligence. The injury came squarely within the terms of the Employers' Liability Act and the trial court held the claimed agreement void for want of mutuality and consideration, and as against public policy. The Queen's Bench reversed this decision, Field, J., saying: "There is no suggestion that the contract was induced by fraud or by force, or made under duress, and it was not a naked bargain made without consideration, for the defendant contributed an amount to the club equal to the whole amount of the contributions from workmen. I am unable to concur in the view taken by the learned county court judge of these facts and of the statute. He held that the contract was against public policy. It is at least doubtful whether, where a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intent of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this one are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy."

Were the opposite view based upon the theory that it is the policy of the law to protect workmen as a class against improvident bargains this reasoning might be conclusive. The case assumes, however, what is obviously not the fact, that the inter-

ests of the general public are not involved and does not consider the broader principle which must lie at the basis of decisions reaching an opposite conclusion, that public policy will not permit one to exempt another from liability for negligence resulting in injury to life or limb.

In this country the courts of Georgia have reached the same conclusion. In Western and Atlantic Railroad Company *v.* Bishop, 50 Ga. 465, an injury occurred likewise through a defect in apparatus. The written agreement of hiring provided that the plaintiff should take upon himself all risk of injury whether occurring through negligence or otherwise. The court held that this prevented a recovery for anything except injury through criminal negligence. Speaking through McCay, J., it said: "We know of no law which limits the right of employer and employee to contract for themselves as to the relative rights and duties of each to the other, provided the contract is not forbidden by positive law or be contrary to public policy. They are both free citizens. Labor is property and the laborer has, and ought to have, the same right to contract in reference to it as other freemen have in reference to their property. Generally, the duties cast by law upon employer and employee are only implications of law, in the absence of stipulations by the parties.

"* * * For myself, I do not hesitate to say that I know of no right more precious, and one which laboring men ought to guard with more vigilance, than the right to fix by contract the terms upon which their labor shall be engaged. It looks very specious to say that the law will protect them from the consequences of their own folly, and make a contract for them wiser and better than their own. But they should remember that the same law-giver which claims to make a contract for them upon one point may claim to do so upon others, and thus step by step, they cease to be free men. We do not say that employer and employee may make *any* contract: we simply insist that they stand on the same footing as other people.

"No man may contract contrary to law, or contrary to public policy or good morals, and this is just as true of merchants, lawyers, and doctors—of buyers and sellers, and bailors and bailees, as of employers and employees."

This reasoning must be sound as far as it goes, but it does not cover one other step involved in the decision which the opinion is written to support; namely, are not contracts generally to exempt from liability for serious personal injury occurring

through negligence opposed to public policy? This decision, made in 1873, has been at various times affirmed. The courts of that State have been, however, much stricter than the English tribunals in requiring clear evidence of the contract of exemption.

The case of Georgia Pacific Railroad Co. *v.* Dooley, 86 Ga. 294; 12 L. R. A. 342, took a view directly contrary to that of Griffith *v.* Earl of Dudley, as to this, holding that a printed rule declaring an exemption from liability and stating that continuance in service would constitute assent to its terms, although put in the hands of the servant, did not constitute a contract. This latter view is that of the Alabama court in Louisville and Nashville Railroad Co. *v.* Orr, 91 Ala. 548. In Darragan *v.* N. E. R. R. Co., 52 Conn. 285, 309, it appeared that a similar rule was placed in the hands of the plaintiff but the point was not pressed, and the court remarked that "when such a question is presented we may be called upon to consider whether public policy will permit a railway company to make such a contract with its employees." The Arkansas court in Little Rock and Fort Smith Ry. Co. *v.* Eubanks, 48 Ark. 460, took a middle ground, holding that an employer may contract against liability for the negligence of a fellow servant imposed by statute, but could not against liability for negligence in duties which he personally owed as employer. This distinction is more apparent than real and fades away entirely in the case of a corporation employer. What real difference is there in this regard between the failure of a servant of a corporation to furnish proper machinery and that of a fellow servant to exercise care? They are both servants, both beyond the immediate control of the persons who constitute the corporation and out of whose pockets a judgment for damages would be paid. The validity of the exemption would have the same effect on the care which would be exercised in the one case as in the other.

The other American courts in jurisdictions where the question has arisen have generally taken ground diametrically opposed to that of the English and Georgia cases.

In 1881 Judge Gresham, holding the Federal Circuit Court, in Roesner *v.* Hermann, 8 Fed. Rep. 782; 10 Biss. 486, decided that a contract of this nature was void on grounds of public policy. In Johnson's Administratrix *v.* Richmond and Danville Railroad Company, 86 Va. 975, the Supreme Court of Virginia in 1890 said of such a bargain: "It would be strange, indeed, if such a doctrine could be maintained. To uphold the stipula-

tion in question would be to hold that it was competent for one party to put the other party to the contract at the mercy of his own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly in this court, than that a common carrier cannot by contract exempt himself from liability for responsibility for his own or his servants' negligence in the carriage of goods or passengers for hire. This is so, independently of Section 1296 of the Code; and the principle which vitiates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers, as such: it operates universally." While this does not seek to make a special rule for the relation of master and servant, does it not go too far in the other direction? What considerations of public policy can come in to avoid a contract of exemption from negligence in ordinary relations, affecting mere property interests? The case was not thoroughly argued, the point under consideration being conceded by counsel.

In Hissong *v.* Richmond and Danville Railroad Company, 91 Ala. 514, decided in the same year, the Supreme Court of Alabama passed upon the effect of a contract of hiring which provided "that the regular compensation paid for the services of employès shall cover all risks incurred and liability to accident from any cause whatever. If an employè is disabled by a accident, or other cause, the right to claim compensation for injuries will not be recognized." The injury happened through the neglect of a railway engineer and the statute provided that in an injury of that nature the master should be liable. The court held the contract of exemption void.

A Kansas statute made the master liable for the negligence of fellow servants. A contract signed by both parties provided that in consideration of the employment of the servant and the compensation paid him for his services and for the risks which he assumed, he agreed to exempt the master from liability for all injuries. The matter coming before the court, it was held in 1883 in Kansas Pacific Railway Co. *v.* Peavey, 29 Kan. 169; 11 Am. & Eng. R. R. Cases 260, that the contract was void, Chief-Justice Horton saying: "The State has such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith."

In Railroad *v.* Spangle, 44 Ohio State 471; 58 Am. Rep. 833; 28

Am. & Eng. R. R. Cases 319, decided in 1886, the court considered a signed contract by which the laborer agreed in consideration of his employment to release the master's liability for the negligence of a superior fellow-servant (recognized in that State), and held it void, saying: "Such liability is not created for the protection of the employed simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interest, and agreements." The same principle was extended to the hiring of slaves in Memphis and Charleston R. R. Co. *v.* Jones, 2 Head. (Tenn.) 517.[3]

The question, What will be a sufficient consideration to support the release, has given rise to some discussion.

Without deciding the principal question the New York Court of Appeals, in Purdy *v.* R., W. & O. R. R. Co., 125 N. Y. 209, held that where one already an employee signed a contract purporting to release the liability in consideration of his continued employment and the compensation agreed to be paid him for his services and the risk assumed, the consideration was colorable only and did not support a contract. It is suggested that this is a question of fact, that the mere existence of previous employment is not conclusive, that the question in each case is, is there a new contract of service of which the exemption agreement forms a part? In Griffiths *v.* Earl of Dudley there was simply a continuance of employment, and the contract was upheld.

It may be said, then, that the current of American authority is strongly against contracts of this nature and with good reason. They do not present questions of assumed risk. No definite course of conduct, no known condition exists in which the employee acquiesces and with a knowledge of which pursues his work. He simply waives in advance a right which may arise in the future from an act which he cannot anticipate. Such an agreement in its effect goes beyond the immediate parties, it encourages negligence and affects society at large. There are certain rights also which are inalienable. The law as generally interpreted does not recognize a consent given by one to another to inflict a personal injury intentionally.[4] Is it consistent with the interests of society that it should give effect to a contract abridging his right of personal security just as truly in another way. The State has an interest in the lives and limbs

3 See, also, Otis v. Penn. Co., 71 Fed. Rep. 136.

4 Shay *v.* Thompson, 59 Wis. 540; 48 Am. Rep. 538, and cases cited; Bull. N. P. 16; Cooley on Torts, p. 187.

of its citizens on the one hand and on the other there are rights too sacred to be the subject of barter.

Taught by experience, many corporations have organized benefit associations, sometimes as branches of themselves, sometimes as separate corporation controlled by them. Membership in them is voluntary, the employees paying their dues by voluntarily allowing a deduction from their wages. The corporations generally pay part of the cost of running them, in many cases assuming the expenses of administration and making up any deficiency in the amounts required for benefits. In return they reap their reward in the insertion of clauses in the contract between the association and the member providing that the receipt of benefits shall bar an action for recovery in damages on the one hand, and on the other that the bringing of suit for the injury shall bar the right to recover benefits. While such contracts have every appearance of attempts to evade the law, while the motives of their promoters are seldom disinterested, and while the schemes may be so worked that the employers contribute little or perhaps nothing and get their protection often practically free, they have been almost universally upheld.

The question may arise in two forms. First, there may be a suit to recover benefits. In such an action, it must be beyond question that if the contract provides that a previous suit for damages shall be a bar, it must be so treated. So far as the matter of benefits is concerned it is simply a contract of insurance. One class of liabilities is excepted, namely injuries for which compensation from the company has been sought. The rate of contribution to the fund may have been fixed with this exception in view. There is nothing contrary to public policy any more than there is in a contract of insurance where the liability is restricted to death or injury by accident and deaths from natural causes are excepted. This proposition is supported, for example, by Donald *v.* C. B. & Q. R. R. Co., 93 Ia. 284; 33 L. R. A. 492.

The converse of the proposition is also upheld by the overwhelming right of authority, and it has been decided in a long line of cases that the receipt of benefits bars a suit for damages, the contract so providing.[5]

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5 Pittsburgh C. C. & St. L. R. R. Co. *v.* Cox, 55 Ohio St. 497; 7 Am. & Eng. R. R. Cases (N. S.) 152; 35 L. R. A. 507. C. B. & Q. R. R. Co. *v.* Miller, 76 Fed. Rep. 439; 22 C. C. A. 264; 40 U. S. App. 448. Martin *v.* B. & O. R. R. Co., 41 Fed. Rep. 125. Eckman *v.* C. B. & Q. R. R. Co., 64 Ill. App. 444. Otis *v.* Penn. R. R. Co. 71 Fed. Rep. 136. Vickers *v.* C. B. & Q. R. R. Co., 71 Fed.

One Federal Court, in Miller *v.* C. B. & Q. R. R. Co., 65 Fed. Rep. 305, has refused to sanction the contract and held that there may be a recovery for damages notwithstanding.

In States where the statute allowing a recovery for injuries resulting in death is construed as creating a new right, it is logically held that if the benefit is not paid to the person entitled to sue he is not barred from recovering damages.[6]

And yet can the main proposition so ably sustained be really supported save upon the principle that a bald contract of exemption from liability is to be upheld? Some of the cases put the validity of the contract upon the ground that the employee does not give up his right to sue at the making of the contract, but only at the time he receives the benefits, which is of course after the injury. It is then that he elects, and his receipt of benefits constitutes an accord and satisfaction. If the benefits proceed from the corporation itself the consideration, it is said, passes directly from the negligent party; if from a subsidiary association, it is treated as a payment made for its benefit and the accord is supported by its contributions to the association as a consideration.

The result is that if the corporation pays its thousand men ten dollars apiece to release absolutely any future rights of action for negligence it is said to be contrary to public policy, while if it contributes ten thousand dollars to a relief association and the thousand men agree either to release any future rights of action, or to give up a benefit for which they have paid a consideration, it is said to be valid. And yet is not the second scheme a mere indirect form of the first? It is sought to be upheld upon the ground of accord and satisfaction; but it is admitted that in order to make it consistent with the demands of public policy the essential acts must be done after the injury. Here they precede it. The consideration passes from the company prior to it; the agreement is prior to it. When the employer is sued he says in effect: "You agreed before the accident that on the happening of a contingency—the collection of the benefit—you would not

Rep. 139. Graft *v.* B. & O. R. R. Co. (Pa), 8 Atl. Rep. 206. Johnson *v.* Phila. & R. R. R. Co., 163 Pa. St. 127. Ringle *v.* Penn. R. R. Co., 164 Pa. St. 529. Fuller *v.* B. & O. Employees' Relief Ass'n, 67 Md. 433. Lease *v.* Penn. R. R. Co., 10 Ind. App. 47. C. B. & Q. Railway Co. *v.* Bell, 44 Neb. 44. Owens *v.* B. & O. R. R. Co., 35 Fed. Rep. 715; 1 L. R. A. 75. Shaver *v.* Penn. Co., 71 Fed. Rep. 931. B. & O. Ry. Co. *v.* Bryant, 9 Ohio C. C. 332. Spitze *v.* B. & O. R. R. Co., 75 Md. 162. C. B. & Q. R. R. *v.* Curtis, 51 Neb. 442, 71 N. W. 42. State *v.* B. & O. R. R. Co., 36 Fed. Rep. 655.

[6] Maney *v.* C. B. & Q. R. R. Co., 49 Ill. App. 105.

sue me; the contingency has happened." How does this differ from an absolute agreement not to sue? If the by-laws provide that a release to the employer be executed as a condition to the payment of benefits, and it is executed, the case is the same. The only consideration supporting the release was a payment prior to the injury, a mere past consideration. The release is simply to carry out the terms of the prior contract, and is subject to all its infirmities.

Such a scheme as thus described may spring from pure motives, may be just and fair, may have the elements of a noble charity, may be a movement in the direction of the brotherhood of man. But in its nature it is a subterfuge and in unprincipled hands becomes simply a clever device by which the workingman pays for his insurance and is rewarded for his forethought by being deprived of a possible righteous cause of action in the future, to his loss, to the injury of his class and to the harm of society at large.

George E. Beers.

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